

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



# 76-1299

To be argued by  
LAWRENCE B. PEDOWITZ

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P7S

## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1299

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

SIDNEY STEIN,

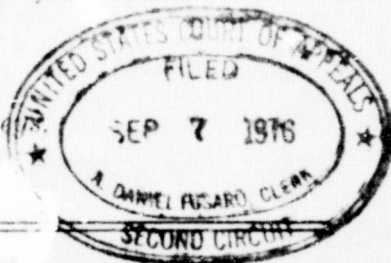
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

### BRIEF FOR THE UNITED STATES OF AMERICA

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—v.—

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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**Preliminary Statement**

Sidney Stein appeals from an order entered on March 9, 1976 in the United States District Court for the Southern District of New York by the Honorable Constance Baker Motley, United States District Judge, denying a motion for reconsideration of a motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

Indictment 74 Cr. 573, filed on June 4, 1974, charged ten defendants, including Stein, with conspiracy to transport and sell unregistered securities, and to commit securities fraud, mail fraud and wire fraud, in violation of Title 18, United States Code, Section 371 (Count One). The indictment also charged Stein and others with five

counts of securities fraud, in violation of Title 15, United States Code, Sections 77q and 77x (Counts Two through Six); two counts of securities fraud, in violation of Title 15, United States Code, Sections 78j, 78ff and Rule 10b-5 of the Securities and Exchange Commission (Counts Seven and Eight); five counts of mail fraud, in violation of Title 18, United States Code, Section 1341 (Counts Nine through Thirteen); one count of interstate transportation of unregistered securities, in violation of Title 15, United States Code, Section 77e (Count Fourteen); and four counts of use of the mails to sell unregistered securities, in violation of Title 15, United States Code, Section 77e (Counts Fifteen through Eighteen). Finally, the indictment charged three other defendants with two counts of wire fraud in violation of Title 18, United States Code, Section 1343 (Counts Nineteen and Twenty). The indictment charged that all the above violations occurred in connection with transactions in the common stock of Stern-Haskell, Inc.

On January 9, 1975 Stein withdrew his plea of not guilty to all counts in which he had been charged and entered a plea of guilty to Counts One, Seven and Fourteen.

Trial of Stein's co-defendants commenced before Judge Motley on January 22, 1975. During the trial Stein testified as a Government witness on February 24, 25, 26, 27, 28 and March 3, 1975. Subsequently, in *United States v. Robinson*, Dkt. No. 75-1197 (2d Cir. April 8, 1976), this Court affirmed the convictions of Stein's co-defendants, Norman Robinson, William Chester and Edgar Reynolds.\*

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\* Defendant Albert Feiffer was also convicted but did not appeal. Defendants Jerome Haskell, Walter Wax and Michael Gardner were acquitted.

On March 28, 1975, Judge Motley sentenced Stein to five years' imprisonment and a \$10,000 fine on Count One, two years' imprisonment and a \$10,000 fine on Count Seven, to run concurrently with the sentence imposed on Count One, and five years' imprisonment and a \$15,000 fine on Count Fourteen, to run consecutively with the sentences imposed on Counts One and Seven. Stein was immediately remanded.

On October 23, 1975, Judge Motley denied Stein's motion for reduction of sentence brought pursuant to Rule 35 of the Federal Rules of Criminal Procedure. On March 9, 1976, Judge Motley denied Stein's motion for reconsideration of his sentence reduction motion.

### **Statement of Facts**

On March 28, 1975, the date of Stein's sentence, counsel for Stein and the Government met with Judge Motley in her chambers for a brief conference. The minutes of that conference, which were sealed, have been transmitted to this Court as part of the record on this appeal. A few minutes after that conference, Stein's sentencing occurred in open court. Stein's counsel, and then Stein, made brief statements to the Court in effect requesting that a sentence of confinement not be imposed. (A. 43-44, 47).\*

Judge Motley then stated that in the course of the trial of Stein's codefendants and especially during Stein's direct and cross-examination, she had learned a great deal about Stein's participation in the securities fraud involving Stern-Haskell stock, Stein's commission of other crimes in the securities industry, and also Stein's cooperation with the Government. Judge Motley also referred to Stein's two prior convictions and quoted at

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\* "A." refers to Appellant's Appendix.



length from the probation report originally prepared in connection with Stein's 1972 sentencing, stating that the evidence presented during the Stern-Haskell trial had caused her to concur in the views stated in that report. Judge Motley also referred to testimony that Stein had attempted to have a sentence fixed. (A. 49-52). Judge Motley then stated that the evidence at the trial had also convinced her that in 1972 Stein had attempted to avoid serving a prison sentence by feigning a suicide attempt and that the crimes on which the Court was about to impose sentence were not "minor crimes which deserve a slap on the wrist." (A. 52-53).

Judge Motley then sentenced Stein to a total of ten years and \$25,000 in fines. (A. 53-54).

On July 28, 1975, Stein moved for reduction of his sentence, reciting in detail Stein's history of prosecution by, and cooperation with, the Government. Stein also based his motion on his position that, although he had been a major securities violator prior to 1970, he had been rehabilitated, as evidenced by the Government's acknowledgement that it had no reliable information that Stein had committed any crimes after 1972. Stein's papers also stated that Stein's attempted suicide, which occurred in October 1972 in Florida only a few days before he was scheduled to begin serving a prison sentence, was not a phony attempt designed to avoid serving his sentence, as had been claimed by the co-defendants and defense counsel who had cross-examined Stein at the *Rubinson* trial. (A. 57-93). On August 28, 1975 Stein filed a request for oral argument. (A. 94-95).

The Government joined in the motion for mitigation requesting that Stein be given additional credit for his cooperation, but opposing any reduction of Stein's sentence below five years and a \$25,000 fine. (A. 96-99). By endorsement order dated October 23, 1975, Judge Motley denied Stein's motion. (A. 100).

On January 23, 1976, Stein moved for reconsideration of his motion to reduce on the ground, in addition to the considerations set forth in support of his original motion, that Stein's mental health was deteriorating during confinement. (A. 101-118). The Government again joined in the motion, this time affirmatively suggesting that Stein's sentence be reduced to five years and a \$25,000 fine, or, in the alternative, that the Court redesignate Stein's sentence as one pursuant to 18 U.S.C. § 4208(a)(2) to accelerate Stein's eligibility for parole. (A. 119). By order dated March 9, 1976 Judge Motley denied Stein's motion.\* (A. 120).

This appeal followed.

## ARGUMENT

**This court should not entertain Stein's challenge to his sentence on grounds not presented before the District Court.**

In this appeal Stein seeks vacation of his sentence and a remand for resentencing before a District Judge other than the District Judge who sentenced him to ten years and \$25,000 in fines. Stein argues that Judge Motley abused her discretion in considering against him charges made during the *Rubinson* trial, primarily by defense counsel while cross-examining Stein, that (1) Stein had attempted in 1972 corruptly to influence the sentence imposed on him in another case and (2) Stein

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\* By letter dated June 16, 1976, Stein's counsel, again joined by the Government, sought a conference before Judge Motley to discuss mitigation of Stein's sentence. By letter dated June 23, 1976, Judge Motley denied the application for the conference noting her prior rulings, the pendency of this appeal and the absence of District Court jurisdiction over 120 days after imposition of sentence.

had feigned suicide in 1972 in order to avoid serving the prison term imposed in that case. In addition, Stein disputes a charge included in his 1972 probation report that he had committed forgery. Stein also claims that the Court erred in considering a 1972 probation report and quarrels with the report's conclusions that Stein would be likely to continue his fraudulent activities and that Stein was not contrite or rehabilitated. (Br. at 17, 21).

Although the Government joined in Stein's motions for mitigation of sentence in the District Court on the ground that Stein had received inadequate credit for his extensive cooperation with the Government, we must point out, as Stein's counsel appear to concede, that Judge Motley's exercises of discretion in imposing sentence and denying mitigation are not reviewable by this Court. *Dorszynski v. United States*, 418 U.S. 424, 431 (1974); *United States v. Seijo*, Dkt. No. 75-1377, slip op. at 4398 (2d Cir. June 24, 1973); *United States v. Slutsky*, 514 F.2d 1222 (2d Cir. 1975). In addition, it was proper for Judge Motley to consider matters other than crimes of which Stein had been convicted, including events referred to in the *Rubinson* trial and in prior reports of the Probation Department. See *United States v. Seijo*, *supra*, slip op. at 4397 n.1.\* Moreover, Judge

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\* The extent to which, if at all, Judge Motley increased Stein's sentence because of the matters he complains of is unclear. (A. 47-54). Cf. *Counts v. United States*, 527 F.2d 542, 544 (2d Cir. 1975); *United States v. Herndon*, 525 F.2d 208, 210 (2d Cir. 1975); *Wilsey v. United States*, 496 F.2d 619 (2d Cir. 1974); *Schawartzberg v. United States*, 382 F.2d 1012 (2d Cir. 1967). Although Judge Motley referred to these items at the time of sentencing, she also announced that the crimes for which Stein was being sentenced were serious ones which "warrant a substantial prison term." (A. 53). In addition, the cross-examination of Stein at the *Rubinson* trial had clearly shown that Stein had

[Footnote continued on following page]



Motley could have denied Stein's motion for reconsideration on the ground that it was untimely, since it was not

committed many other securities violations. At one time he testified that he had committed between 200 and 300 such violations (A. 128) several of which were explored in detail. (Tr. 2724-31, 3807) ("Tr." refers to the trial transcript of the *Rubinson* trial.)

Finally, Judge Motley's recitation of matters in aggravation was not without foundation. Much of the information Stein complains of comes from the report of the Probation Department, normally a primary source of sentencing information. Judge Motley's conclusion that Stein had tried to fix his earlier case came from Stein's testimony in *Rubinson* which, although not crystal clear, lends itself to the interpretation that Stein had discussions in 1972 concerning efforts to bribe someone to get his sentence reduced and that he did not report these discussions to the Government until several months after they began. (A. 156-63). Stein testified in detail concerning this transaction in 1973 in *United States v. Quase*, 73 Cr. 80 (S.D.N.Y.). In addition Stein testified in *Rubinson* that in 1966 he had discussed paying \$25,000 to another person to avoid being indicted. (Tr. 4127-29, 4144-45). Stein also testified in *Rubinson* concerning his suicide attempt in 1972 on the eve of the commencement of his prison sentence. (A. 172-76). Although Stein said that he had limited recollection after he took an overdose of pills. (A. 173-74), Judge Motley also had before her an affidavit of an Assistant United States Attorney, based on observations by a United States Marshal who saw Stein at the psychiatric hospital where he was taken to recuperate, charging that the suicide effort was fraudulent (Defendant Reynolds Exhibit F), and the report of the United States Medical Center, Springfield, Missouri, supporting Stein's claim of psychiatric illness. (Defendant Chester Exhibit I). Of Course, Judge Motley also heard the unsworn claims of co-defendant *Rubinson* that he was present on the occasion and knew Stein to have feigned the suicide attempt. (Tr. 3709-10).

While Stein claims here that he was denied an opportunity to rebut the evidence of these matters, he did not below and does not here indicate specifically what rebuttal evidence he wishes to present. His motion papers below included no documentary proof or affidavits conflicting with Judge Motley's observations. The documents relating to his mental condition in 1972 are substantially consistent with the evidence received in *Rubinson*, and the information about Stein's and his wife's current condition and Stein's cooperation with the Government, was simply part of his plea for leniency.



filed until long after the expiration of the ten-day period following the denial of his Rule 35 motion. See Rule 9(m) of the General Rules of the United States District Court for the S.D.N.Y.; cf. *United States v. Kahane*, 527 F.2d 491 (2d Cir. 1975).

The legal theory underlying Stein's argument in this Court differs considerably from that which he advanced below. In the District Court, Stein made a Rule 35 motion for mitigation directed entirely to the District Court's discretion. Here, citing cases decided on due process grounds under 28 U.S.C. § 2255, Stein follows an entirely different tack requesting that his sentence be vacated because he was not given an adequate opportunity to contest a number of factors mentioned by the District Judge before imposing sentence. See *United States v. Tucker*, 404 U.S. 443 (1972); *Townsend v. Burke*, 334 U.S. 736 (1948); *United States v. Powell*, 487 F.2d 325 (4th Cir. 1973); *United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970); *United States v. Looney*, 501 F.2d 1039 (4th Cir. 1974).\*

Accordingly, Stein's application that his sentence be vacated is not properly before this Court, since it has not been ruled on by the District Court. In order properly to raise the issues Stein asks this Court now to rule on Stein must first seek vacation of his sentence on due process grounds in the District Court. The appropriate resolution of this appeal is, therefore, either to affirm Judge Motley's order, since her refusal to mitigate Stein's sentence is not reviewable and the motion for reconsideration was untimely, leaving Stein free to file a complaint under § 2255, or to remand the case to Judge Motley \*\* for

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\*On the record now before it, this Court could not find that Judge Motley's observations were inaccurate or that they were necessarily relied upon to increase his sentence. See p. 6n., *supra*.

\*\* Stein has shown no basis for his request that this matter be referred to a District Judge other than Judge Motley.

treatment of Stein's due process claims. See *United States v. Hermann*, 524 F.2d 1103 (2d Cir. 1975); *Ferranto v. United States*, 507 F.2d 408 (2d Cir. 1974); *Wilsey v. United States*, 496 F.2d 619 (2d Cir. 1974).

### CONCLUSION

The order below should be affirmed, or, in the alternative, the case should be remanded to the District Court for consideration of Stein's due process claims.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK )  
COUNTY OF NEW YORK) ss.:

*Audrey Strauss* being duly sworn,  
deposes and says that she is employed in the office of  
the United States Attorney for the Southern District  
of New York.

That on the 7th day of September, 1976,  
he served a copy of the within brief by placing the same  
in a properly postpaid franked envelope addressed:

Phillips, Nizer, Benjamin, Krim & Ballon, Esqs.  
40 West 57th Street  
New York, N. Y. 10019

And deponent further says that he sealed the said envelope  
and placed the same in the mail box for mailing at One St.  
Andrew's Plaza, Borough of Manhattan, City of New York.

*Audrey Strauss*

Sworn to before me this

7th day of September, 1976

*Jeanette Ann Grayeb*

JEANETTE ANN GRAYEB  
Notary Public, State of New York  
No. 24-1541575  
Qualified in Kings County  
Commission Expires March 30, 1977